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PETITIONER'S REPLY BRIEF

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1966
No. 832

JAMAICA TIME PETROLEUM, INC.,

Petitioner,

vs.

FEDERAL INSURANCE COMPANY,

Respondent.

PETITIONER'S REPLY BRIEF

Petitioner hereby replies to Respondent's Brief in Opposition to Petitioner's Petition for Writ of Certiorari.

I

RESPONDENT'S JURISDICTIONAL ARGUMENT

Petitioner recognizes Respondent's statement that review on certiorari is a matter of

sound judicial discretion to be exercised within the framework of Rule 19(1)(b) [19(1)(a) is not applicable to the case at bar though Respondent so urges] and contends that Petitioner has amply demonstrated that the Tenth Circuit Court of Appeals has decided an important question of law which has not been, but should be, settled by this Court and has sanctioned such a departure by the Trial Court as to call for an exercise of this Court's power of supervision, all as set forth in the Petitioner's Petition for Writ of Certiorari.

The questions of due process involved in (1) whether a non-expert witness amenable to process who was paid excessive witness fees is competent to testify, (2) whether after such witness has testified, petitioner was not entitled to an appropriate instruction, (3) the Trial Court's condonation of such practices, and (4) whether Petitioner received a fair trial in view of the pretrial publicity, are all important questions of federal law of the type contemplated by Rule 19(1)(b).

The denial of a review by this Court would amount to complete condonation of such unfair, unjust, lacking in due process practices.

II

RESPONDENT'S FACTUAL ARGUMENT

Petitioner contends that respondent's rehashing of the facts is little, if any, value to this Court in deciding the legal questions

presented. Respondent presents the specious argument that the jury verdict is probably supported by factual evidence and therefore a review by the Supreme Court is unnecessary. This totally overlooks the true legal questions of due process presented. Respondent's argument of the facts has no relation to the legal questions presented but manifests the concept that expediency must replace a review by this Court to effect due process of law.

The facts relevant to the questions presented are simple.

REX CONN, an adjudged habitual criminal, was paid $1,000 by attorneys and representatives of the Respondent to testify. He instructed Respondent to deliver the money to his mother. Witness CONN first denied knowledge of the alleged arson until the $1,000 "offer of reward for information" was made. It appears that the first inquiries made of witness CONN leading to the "reward for information" produced no information. When $1,000.00 for such information was offered, witness CONN then remembered the alleged arson. He then received his reward. The alleged "reward" of $1,000.00 paid to witness CONN was non-public and non-publicized. Its conception was accomplished by the respondent's lawyer and investigator at their meeting at the penitentiary with habitual criminal CONN, their most vital witness.

Witness CONN, whose testimony in the words of Circuit Judge Breitenstein "is essential to the insurer's case," testified at the time of trial over continual objection of Petitioner. No instruction was given as requested, though the jury should have considered such payment to

witness CONN in judging his credibility. Witness CONN had expressed animosity towards GEORGE POULOS. Witness CONN in the subsequent criminal arson trial of POULOS pled guilty to arson. Witness CONN at said trial was already serving a ten to thirty year sentence as an habitual criminal and was told that the sentence for arson would try to run concurrently, which it did.

Contrary to the respondent's argument that Witness CONN is to be believed because he was possibly testifying against his own interest, the true facts are that witness Conn was in prison as an habitual criminal and by testifying for the respondent he had nothing to lose. Additionally, he had hopes of a reduction in sentence as an habitual criminal. His arson sentence ran concurrently and he received $1,000 which he gave to his mother. It takes little imagination to think of an habitual convict or two who would testify to anything for $1,000.

Petitioner respectfully urges that the alleged $1,000 reward which respondent charitably paid to witness CONN was in truth and in fact a "bribe" or "pay-off" to a witness which in the end accomplished for the respondent the successful defense of an insurance claim for $100,000. The record does not disclose whether this $1,000 was paid in cash but it does reflect that the payment by the respondent insurance company's lawyer and investigator was not made directly to witness CONN, but surreptitiously, to his mother.

To contend that "the offer and payment of the reward were not contingent either on the testimony of CONN in Court or on the outcome of

any litigation" 1/ and "when the insurer offered and paid the reward it took a calculated risk of securing usable and unbelievable information" 2/ strains common sense, for the following reasons:

(1) Why did Respondents seek such information from witness CONN if the end result would not be its introduction into evidence either directly or by deposition at the time of trial? How else could such information be of value to the Respondents?

(2) Respondent's calculated risk must have been minimal. The first no reward request for information from witness CONN produced nothing; the second time accompanied by the "reward" witness CONN was found to have possession of usable and believable information, which suddenly manifested itself when respondent arranged to pay the $1000.00.

Additionally massive and pervasive pretrial publicity preceded the trial in this matter.

The above facts are relevant to the issues presented. Upon these facts rests the overriding issue of whether under these circumstances Petitioner received a fair trial consistent with the due process clause of the 14th Amendment.

Respondent continually placed before this Court and the Circuit Court of Appeals, its offer

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1/ Jamaica Time Petroleum v. Federal Insurance Company, 366 F. 2d 156.

2/ Ibid

to prove by witness CONN that GEORGE POULOS was hired by petitioning president to have the subject aircraft destroyed for $25,000. The trial Court refused this offer of proof. Its improper reassertion at each appellate stage is another eloquent example of respondent's practices throughout the trial.

With all of the Respondent's innuendoes and accusations, the plain facts are that Petitioner's president has never been indicted, charged or accused of conspiracy, complicity, or any connection whatsoever with the alleged arson by the Wichita police or by any authorized police authority.

III

RESPONDENT'S LEGAL ARGUMENT

Petitioner's reasons for granting the writ are simple. Petitioner was denied a fair trial consistent with the due process clause of the 14th Amendment because: (1) Witness CONN, a non-expert witness amenable to process, having been paid excessive witness fees to testify, gave highly prejudicial and false testimony, the effect of which was to nullify all of Petitioner's evidence and thereby deprive Petitioner of due process of law. (2) Having so testified, Petitioner was entitled to an appropriate jury instruction that "the law does not authorize the payment to law witnesses in excess of ordinary witness fees, and if a witness has been so paid, that fact may be considered in determining the weight and credit to be given to his testimony? (3) Even assuming for the sake of argument only, that witness CONN spoke the truth, there was still a denial of due process since the leading case, State ex rel Spillman v. 1st Bank

of Dickerson, 114 Neb. 423, 207 N. W. 674 and 45 A. L. R. 1418 holds that ...

> " ... its tendency [payment of excessive witness fees to a non-expert witness amenable to process] is to work a denial of due process of law. It is not necessary for us to find that the intent of the contract was to procure perjury, but that the contract had the tendency and opened a strong temptation to the procurement of perjury. The tendency of such arrangements is to pervert justice, to bring courts into disrepute, and to cause a lack of confidence therein." (Emphasis added)

And Blackburn v. Alabama, 316 U. S. 199, 4 L. Ed. 2d 243, 80 S. Ct. 274 holds the due process clause of the 14th Amendment forbids fundamental unfairness in the use of evidence, whether true or false.

Is not such conduct so reprehensible that its effect is to deny due process of law and should not this Court condemn such conduct and prevent its future repetition? If such conduct were allowed to continue the concept of due process would be meaningless.

Respondent's argument and the opinion of the 10th Circuit Court of Appeals does not face the problem or answer the question. Is the theory, reasoning, purpose, rule and significance behind the rule of the cases holding that a non-expert witness cannot enforce a promise to pay excessive compensation applicable to the case at bar or is it not? It begs to the question to say that it does not because "we are not concerned with any dispute over failure to pay.

CONN's mother received the $1,000." [3/] The reasoning and purpose of such cases is to prevent and discourage such conduct in a courtroom because it contravenes public policy and has a tendency to work a denial of due process of law, whether or not such question arises when the witness sues for his excessive compensation or such as in the case at bar. The goal to be reached is the same -- prevention of such conduct.

If such conduct is not reprehensible, unfair and violative of due process, then Petitioner admits its Petition for Writ of Certiorari is unmeritorious.

Respondent argues that the law cited by the Petitioner in Section 1-A of its Petition is not applicable because, the cases were either criminal cases or, as in the International Shoe Company case, treated with the application of a process statute of the State of Washington to a foreign corporation, is an attempt to confine every legal authority to its specific facts. If such application of authorities prevailed, no prior Court holding would ever be applicable to a subsequent litigation.

What Respondent overlooks is that the issues are the same even if the facts are not the same. If the issues are the same, then the precedents are applicable regardless of the factual situation.

Petitioner respectfully submits that the

3/ Jamaica Time Petroleum, Inc. v. Federal Insurance Company, 366 F. 2d 156.

cases cited in its Reasons for Granting the Writ are applicable to the case at bar and should be so applied by this Court.

With respect to pretrial publicity preventing a fair trial consistent with due process, this concept is in its infantcy. Petitioner contends that such pretrial publicity had a substantial adverse effect on Petitioner's receiving a fair trial and, therefore, should be considered by this Court.

IV

CONCLUSION

For the foregoing reasons, as well as those which have been urged in the Petition, certiorari should be granted.

Respectfully submitted,

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